CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE, APPELLANT,

vs.

JOSEPH TRINER CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED SEPTEMBER 17, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE, APPELLANT,

vs.

JOSEPH TRINER CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX.

	Original	Print
Proceedings in Supreme Court of Illinois	1	1
Caption (omitted in printing)	1	
Abstract of record from Circuit Court of Cook County	2-1	1
Complaint	2-1	1
Exhibit "A"—Label appearing on bottles containing "Old Quaker" brand of whiskey	2-23	17
"B"—Form of Fair Trade agreement used by plaintiff	2-24	18
"C"—Form of Fair Trade slip attached to orders	2-27	20
Order directing issuance of temporary injunction	2-28	21
Motion of defendant for decree dismissing complaint for want of equity	2-29	22
Motion of defendant to dissolve temporary injunction	2-29	22
Decree	2-34	26
Report of proceedings at trial	2-36	27
Opinion, Epstein, J.	2-36	27
Assignments of error	3	37
Opinion, Wilson, J.	5	38
Judgment	30	57

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 27, 1936.

—8338-C

	Original	Print
Minute entry of submission	32	58
Petition for appeal	35	58
Assignments of error	41	62
Order allowing appeal	59	65
Bond on appeal ..... (omitted in printing) ..	62	
Citation and service ..... (omitted in printing) ..	68	
Præcipe for transcript of record	71	66
Notice of filing præcipe	75	69
Clerk's certificate ..... (omitted in printing) ..	76	
Certificate of transmittal ..... (omitted in printing) ..	78	
Statement of points to be relied upon and designation as to printing record	79	69

[fols. 1 & 2] [Caption omitted]

[fol. 2-1]

IN SUPREME COURT OF ILLINOIS

FEBRUARY TERM, A. D. 1936

Appeal from Circuit Court, Cook County

Honorable Benjamin P. Epstein, Judge Presiding

JOSEPH TRINER CORPORATION, a Corporation, Appellee,

vs.

CARL W. MCNEIL, Doing Business as McNeil's Liquor Store, Appellant

Abstract of Record—Filed January 15, 1936

Placita.

Complaint filed herein on November 8, 1935, in words and figures as follows:

COMPLAINT

Joseph Triner Corporation, a corporation, plaintiff, by Moses, Kennedy, Stein & Bachrach, its attorneys, complaining of Carl W. McNeil, doing business as McNeil's Liquor Store, defendant, respectfully shows to the court and alleges:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois and is engaged, and at all times and time hereinafter mentioned was engaged, in business in the City of Chicago, State of Illinois, as a distributor, selling at wholesale to re-[fol. 2-2] tailers, for resale in said city, various brands of liquors and alcoholic beverages of standard quality.

2. That the defendant, Carl W. McNeil, under the name and style of McNeil's Liquor Store, is engaged in said city and for six months or more prior to the institution of this suit has been continuously engaged in selling various brands of liquor and alcoholic beverages to the general public for purposes of consumption.

3. That the plaintiff, Joseph Triner Corporation, a corporation, sells at wholesale to retailers for resale in said city, and at all times mentioned herein and for more than a year has so sold, certain liquors and alcoholic beverages commonly known, and hereinafter referred to as "Schenley Products"; that said Schenley Products are manufactured by certain affiliated distilleries generally known as the "Schenley distilleries"; that plaintiff purchases and has purchased in the State of Illinois all of the Schenley Products sold by it, and which it sells, from Schenley Distributors, Inc., a corporation organized and existing under and by virtue of the laws of the State of New York and duly qualified to do business in the State of Illinois; that said Schenley Distributors, Inc. is and at all times mentioned herein was, the sole and common sales agent in the State of Illinois of said Schenley distilleries; that said Schenley distilleries distribute and have distributed Schenley Products in the State of Illinois through said Schenley Distributors, Inc.

4. That said Schenley Distributors, Inc., itself does not sell, nor at any time or times mentioned herein has it sold, any material amount of Schenley Products to persons selling said Products at retail in said City of Chicago; that [fol. 2-3] said Schenley Products are sold to said retailers by certain wholesalers, like plaintiff, who purchase in the State of Illinois all of said Products from Schenley Distributors, Inc. and vessell same at wholesale to said retailers; that said wholesalers of Schenley Products are generally known to persons engaged in the liquor business in said city (and are hereinafter referred to) as the "local Schenley distributors"; that pursuant to a business policy of said Schenley Distributors, Inc., the number of said local Schenley distributors in said city is, and at all times and time mentioned herein has been, about ten; that plaintiff, Joseph Triner Corporation, a corporation, and the other local Schenley distributors in said city, sell and at all times and time mentioned herein have sold substantially all of the volume of Schenley Products sold to retailers in said city.

5. That the plaintiff, Joseph Triner Corporation, a corporation, enjoys, and at all times and time mentioned herein and for more than a year has enjoyed, an established, substantial and profitable business in its wholesaling of Schen-

ley Products for resale in said city; that it owns and uses a large office building, leases considerable warehouse space and employs a large staff of salesmen in the conduct of said business; that an important and valuable asset of said business at the present time and for sometime passed is and has been the good will of the retailers who purchase Schenley Products from plaintiff and sell same in said city, and of the public and consumers who purchase said Products in said city; that plaintiff has expended large sums of money in securing and maintaining said good will; that the good will of said retailers who purchase from plaintiff consists [fol. 2-4] and has consisted in their high regard for plaintiff and said Products, and their habit and willingness to buy Schenley Product sfrom plaintiff, to handle said Products in their stores and push the sales thereof; that such good will of plaintiff's retailer customers has been developed by the character of credit and merchandising policies followed by plaintiff during the course of its business in connection with the sale of said Products, and by its maintenance, and the maintenance of the other local Schenley distributors and Schenley Distributors, Inc., of certain business policies more specifically set forth hereafter for assuring retailers of Schenley Products in said city a continued and reasonable profit upon their retail sales through retail price uniformity; that the good will of said public and consumers who purchase Schenley Products in said city consists in their knowledge and ability to identify the various Schenley Products, in their knowledge of and ability to determine the relative value of the various Schenley Products as compared with each other and as compared with competing liquors, in the consequent high regard of said consumers and public for Schenley Products, and in the willingness and habit of large numbers of said public and consumers to purchase and repurchase said Products; that said good will of said public and consumers was created, in part, and has been and is retained, in part, by the maintenance of said business policies of plaintiff, the other local Schenley distributors and said Schenley Distributors, Inc., more specifically set forth hereafter for retail price uniformity.

6. That said Schenley Products consist of various brands of straight whiskeys, blended whiskeys, bonded whiskeys,

[fol. 2-5] gins, brandies, cordials and rums; that all of said brands and each of them are and is and at all times have and has been of standard quality or make; that each of said brands of said Schenley Products substantially differs in quality from each of the other of said brands and each of said brands is sold by retailers in said city to the public at a price different from the price that each of the other of said brands is sold, dependent in price upon the particular quality of said brand; that all of said brands and each of them are sold in bottles of standard size and content, each and all of which bottles has and have, and at all times had, affixed thereon a paper label bearing the trade-mark, duly registered with United States Patent Office, of the producer of the product, and the brand and name of said producer; that one of said brands of Schenley Products is and has been known to persons engaged in the liquor business and to the general public in said city by the trade-mark and brand name of "Old Quaker," (a facsimile of the label affixed to bottles containing said brand being attached hereto and marked Exhibit "A"); that said trade-mark and brand name "Old Quaker" distinguishes said brand of Schenley Products from competing liquors and alcoholic beverages sold in said city.

7. That each and all of said brands of Schenley Products aforesaid, including said brand of "Old Quaker," is and are and at all times was and were sold to the general public and consumers in said City of Chicago at a fair and reasonable retail price for such commodities; that each and all of said brands of Schenley Products so sold at retail in said city, including said brand of "Old Quaker" is and are and at all times mentioned herein was and were in fair and open competition with commodities of the same general [fol. 2-6] class sold at retail in said city produced by persons other than the Schenley distilleries above mentioned; that said brand of "Old Quaker" is and at all times mentioned herein was in open and fair competition in said city with approximately ten other brands of the same general class of commodity produced by others and sold in said city.

8. That the sale at retail of liquor and alcoholic beverages in this country is of not more than two years' duration; that the practice of retail selling which has grown up during said period and which prevails today consists of

sales to the consumer of particular trade-mark or trade-named brands of liquors and alcoholic beverages in bottles of various standardized volumes to the exclusion of sales in bulk; that as a result of the novelty of the market and said manner of selling only branded merchandise, the retail liquor sales business throughout the United States as well as in said City of Chicago is peculiarly and highly competitive; that great numbers of brands of diverse qualities produced by many different manufacturers, and sold to the consumer at greatly varying prices, appear and disappear in the market seeking the public taste; that hundreds of different competing brands of liquor and alcoholic beverages are being sold at retail in said City of Chicago at the present time; that because of the highly competitive character of said market and the number of brands sold there is great difficulty in distinguishing the relative value of the different brands, and manufacturers and distributors of liquors of standard and uniform quality bearing the trade-mark or brand or trade-name of the producer are confronted with the problem of establishing the identity, merit [fol. 2-7] and worth of their respective brands in the mind of the public and consumers; that said problem is rendered especially difficult by virtue of the fact of retailers engaging in uneconomic price-cutting and otherwise selling the same brand at various prices; that it is essential to said manufacturers and distributors of brands of uniform and standard quality bearing the trade-mark, brand or trade-name of the producer, as well as in the interest of the public and consumers, that said public and consumers identify said brands and their worth as compared with other brands; that the only satisfactory and feasible method for accomplishing such identification is by having the retail sale of any brand maintained at a uniform reasonable price for said brand throughout a particular market.

9. That after the commencement of the sale of liquors and alcoholic beverages in this country there arose, and since has existed, a practice among a few sellers of liquor at retail in said City of Chicago of selling, either from time to time or continuously, well-known trade-marked and standard brands of liquor, which theretofore have acquired wide-spread attention and public favor by reason of successful merchandising methods, extensive advertising,

standardized high quality and a reasonable uniform price, at prices conspicuously lower than the prices prevailing in said city for said brands and at a loss or scant return to said retailers in order to attract the public to their stores and sell other brands of liquor or general merchandise at prices made sufficiently high to meet said loss and assure a general profit; that said practice of price-cutting is uneconomic and injurious and has caused and causes irrepara- [fol. 2-8] ble damage and severe loss to the producer of the brands sold at the cut price, to the great number of the distributors thereof and to the consumer or public; that where in a particular community of said city price-cutting of such character by some retailer has occurred, its immediate effect was to force and compel other retailers doing business in the same community, in order to meet the competition, quickly to lower their own prices of whatever brand of liquor happened to be cut, either to the same cut price or to a still lower price, and to sell said brand at the lower price; that in a very short time the lower price or prices would spread from community to community of said city, and would generally prevail; that upon a cut or lower price becoming prevalent its usefulness as a medium for attracting customers to any particular retailer is lost and sales by all retailers at the cut price become profitless and uneconomic; that once the price of a brand is sold generally at a lower price, the original or higher price cannot be restored; that upon the general establishment of an uneconomic price-cutting retailers generally are compelled because of their inability to secure a fair and reasonable return or profit, to stop or diminish their sales of the brand whose price has been cut and to offer and sell to the public substituted brands upon which a profit is possible; that such substituted brands are generally private or unknown brands; that such substitution of new brands soon destroys or greatly contracts the market for the brand which has been substituted for, and the business of the producer of said brand and of the wholesale and retail distributors thereof, is irreparably injured; that the producer of said brand is compelled, if he can afford to do so, to create a new [fol. 2-9] trade-name and/or trade-mark for the brand whose market has been destroyed and to sell the new brand at a higher price than the original price of the old brand

because of attendant promotional cost and the public is compelled to pay the higher price.

10. That there is and has been in force in the State of Illinois an Act duly passed by the General Assembly and approved by the Governor of the State on July 8th, 1935, known and cited as the Fair Trade Act; that said Act provides as follows:

"An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

"Be it enacted by the People of the State of Illinois, represented in the General Assembly:

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such pur- [fol. 2-10] chaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

"Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

"Section 4. This Act may be known and cited as the 'Fair Trade Act.'"

[fol. 2-11] 11. That said Schenley Distributors, Inc., a corporation, adheres and at all times mentioned herein has adhered to a business or trade policy of securing to the general public or consumers in said City of Chicago a uniform and standard retail price fixed at an amount fair and reasonable to manufacturer, distributor and consumer for each brand of Schenley Products sold in said City of Chicago, including said brand of "Old Quaker" heretofore mentioned; that the said uniform and standard retail price prevailing at the present time and at all times and time mentioned herein for said brand of "Old Quaker" is and was $1.89 per quart, 98 (per pint and 50c per one-half pint; that said uniform and standard retail prices for said brands of Schenley Products and each of them including said brand of "Old Quaker" at all times were and are fair and reasonable to manufacturer, distributor and consumer.

12. That said Schenley Distributors, Inc., a corporation, in accordance with its said business or trade policy of securing to the public or consumers in said city a uniform and standard retail price for each of its brands, including said brand of "Old Quaker" has suggested and suggests from time to time to plaintiff and other local Schenley distributors of this city a minimum retail price for which each of its brands should be sold at retail in said city and has announced from time to time to plaintiff and said local Schenley distributors that it would not make further sales of Schenley Products to any of the local Schenley distributors who sold or sells said products, or any of them, to any retailer who is known by said distributor to sell any brand

of Schenley Products in said city at less than the uniform [fol. 2-12] and standard retail price for same so suggested by Schenley Distributors, Inc.; that said Schenley Distributors, Inc. upon learning that any of said local Schenley distributors have sold any brand of Schenley Products to such a retailer, has refused to continue selling and stopped selling said Products to said local Schenley distributor.

13. That after the enactment of said Fair Trade Act and during the three months preceding the institution of this suit the plaintiff, Joseph Triner Corporation, a corporation, to protect itself and the public against the injurious and uneconomic practices recognized by said Act, and to avail itself of the benefits of said Act, announced to its trade that it would not sell brands of Schenley Products to any retailer for resale at retail in the City of Chicago, except on the condition that said retailer would not undersell the uniform and standard Schenley retail price suggested by Schenley Distributors, Inc., and then prevailing for said brands; that all retailers would be given a fair and equal opportunity by plaintiff to purchase said brands of Schenley Products from it on the same condition; that during the three months preceding the institution of this suit and at all times and time therein, any and all sales of Schenley Products by plaintiff to retailers in said city were made under agreements of sale by plaintiff with each of said retailers containing a provision that said retailers would not resell at retail in said city the brands or brand of Schenley Products sold to said retailers by plaintiff except at the price stipulated by plaintiff in said provision, that is to say, except at the uniform and standard Schenley retail price then prevailing; that the existence of said business or [fol. 2-13] trade policy of plaintiff, and the promises of said retailers to plaintiff not to resell except at the price stipulated by plaintiff, that is to say, the uniform and standard Schenley retail price, were known to the defendant at the time he engaged in the conduct hereinafter set forth.

14. That after the enactment of said Fair Trade Act and during said three months preceding the institution of this suit each of the other local Schenley distributors in the City of Chicago announced to his respective trade that in order to secure protection for himself and the public against the injurious and uneconomic practices recognized

by said Act and to avail himself of the benefits of said Act, said distributor would not sell brands of Schenley Products to any retailer for resale at retail in said City of Chicago except on the condition that said retailer would not undersell the uniform and standard Schenley retail price suggested by Schenley Distributors, Inc. and then prevailing for said brands; that all retailers would be given a fair and equal opportunity to purchase said brands of Schenley Products from said distributor upon the same conditions; that during said three months each of said local Schenley distributors made all or substantially all his sales of Schenley Products to retail sellers in said city under agreements with said retailers containing a provision that said retailers would not resell at retail in said city any Schenley Products sold them by said local Schenley distributor except at the price stipulated by said local Schenley distributor in said agreements, that is to say, except at the uniform and standard Schenley retail price then prevailing for said product.

15. That as a consequence and direct result of the above-mentioned business or trade policies of Schenley Distrib-
[fol. 2-14] utors, Inc. and of the plaintiff and other local Schenley distributors, and of the undertakings of retailers as aforesaid not to sell below the standard and uniform Schenley retail price for Schenley Products, approximately 85% of the retailers of said Products in said City of Chicago maintain and at all times and time during the three months preceding the institution of this suit have maintained said standard and uniform retail price; that the maintenance of said standard and uniform retail price resulted in (a) an enhancement during said period of three months in the good will of the retailers, selling Schenley Products in said city, for the various brands of Schenley Products particularly said brand of "Old Quaker." Said retailers enjoy and at all times during said period enjoyed comparative immunity from injurious and uneconomic price-cutting of said brands by other retailers and were assured thereby of, and obtained during said period, and are now assured of and do obtain, a reasonable compensation for their services and the services of each of them as retail sellers of Schenley Products in said city. Said retailers of said city are willing and at all times during said period were willing to handle said Products and develop

the market therefor; (b) an enhancement during said period of three months in the good will of the public and consumers of liquor in said city for the various brands of Schenley Products particularly said brand of "Old Quaker." Wide-spread identification by the public and consumers in said city of the various brands of Schenley Products and especially of said brand of "Old Quaker," and wide-spread understanding by said public and consumers of the relative worth of said brands as compared with each other and with competing brands was attained [fol. 2-15] during said period and now exists. Public confidence in said liquors was retained during said period; (c) a substantial increase in the volume of sales in the Chicago market of Schenley Products during said period. Retailers in said city during said period more than doubled their volume of sales of Schenley Products and the sales by plaintiff and the other local Schenley distributors by said Products to said retailers was corresponding augmented; (d) the enjoyment by the manufacturers, local Schenley distributors and retailers in said city during said period and at the present time of a reasonable profit upon sales of Schenley Products; (e) an unobstructed sale in said city during said period of Schenley Products and a continued high quality in the Products sold because of increased volume of production.

16. That on various occasions in the month of October, 1935, the defendant, Carl L. McNeil, doing business in said City of Chicago as McNeil Liquor Store, threatened to sell, offer for sale and advertise for sale in said City the brand of Schenley Products known as "Old Quaker," heretofore described herein, at a price lower than the uniform standard Schenley retail price for said brand stipulated by the seller in the contracts of sale then existing between plaintiff and the other local Schenley distributors with substantially all of the retailers in said city as above set forth; that at the time and times of the making of said threats and prior thereto said defendant well knew of said stipulation and the price so stipulated and of the promises of said retailers not to resell at retail in said city said brand of "Old Quaker" below the uniform and standard Schenley retail price for said brand as fixed in said con- [fol. 2-16] tracts, and at said times and time also well knew that plaintiff and the other local Schenley distributors

had sold and were selling to said retailers in said City said brand of "Old Quaker" upon the agreement of said retailers as above set forth not to resell said brand sold to them below said uniform and standard Schenley retail price for same; that on or about October 16, 1935, plaintiff by its agent informed the defendant of the business or trade policy of plaintiff heretofore set forth and of the above stated business or trade policies of the other local Schenley distributors, and said agent informed the defendant of the intention of and acts done by plaintiff and said local Schenley distributors, heretofore set forth, to avail themselves of the benefits of the Fair Trade Act, and said agent informed the defendant of the provision of the said Fair Trade Act and of its pu pose and policy, and said agent informed said defendant of the irreparable injury to plaintiff which would ensue if defendant executed his threat and threats and sold said brand of "Old Quaker" at a price below the uniform and standard Schenley price for same, and said agent specifically informed the defendant of the existing undertakings of the retailers in said city, heretofore set forth, not to resell any Schenley Products at retail in said city below the uniform and standard Schenley price for same; and said agent requested the defendant not to sell, offer for sale or advertise for sale at retail in said city and Schenley Products including said brand of "Old Quaker" below said price and said agent informed the defendant of said price and that plaintiff would be willing to sell Schenley Products under an agreement with the defendant not to resell said Products at retail in said city below said uniform and standard Schenley re- [fol. 2-17] tail price for same and said agent tendered to said defendant a certain form of written agreement, attached hereto as Exhibit "B" and incorporated herein, which plaintiff used and uses in making sales of Schenley Products to retailers in said city and also otherwise offered to take any individual orders defendant wished to give plaintiff for any Schenley Product provided there was attached to the order, slips bearing a certain agreement in writing, a copy of which is attached hereto as Exhibit "C" and incorporated herein, said form of agreement likewise being then and ever since used by plaintiff in making sales of Schenley Products to retailers in said city; that said defendant then and there refused to enter into any such

agreement or give such orders or otherwise undertake or state that he would not execute his threat or threats.

17. That on or about October 18, 1935 the defendant, Carl L. McNeil, doing business as McNeil's Liquor Store, offered to sell and sold on the premises of said store at, to-wit, 3144 West Irving Park Boulevard, Chicago, Illinois, large quantities of said brand of "Old Quaker" at the price of 77c per pint; that at the time of said offer for sale and sales, the said defendant well knew of the contracts and agreements of plaintiff and the other local Schenley distributors with the retailers of said city entered into pursuant to the Fair Trade Act as above set forth not to sell below the uniform and standard Schenley retail price for same stipulated by the seller in said contracts, and that said retailers and each of them were then and there selling in said city said brand of "Old Quaker" pursuant to said stipulation at not less than 98c per pint.

[fol. 2-18] 18. That thereafter the defendant was requested by an agent of the plaintiff to cease underselling the price so fixed in the various Fair Trade Agreements as above set forth but the defendant stated that he would not comply therewith and stated that he intended to undersell at retail in said city from time to time as he pleased the uniform and standard Schenley retail price for said brand of "Old Quaker" as fixed in said Fair Trade Contracts and threatened so to do.

19. That as result of said offer to sell and sales of the defendant a great number of the other retailers in the community of said city where said store of defendant was located threatened to violate their contracts with plaintiff and the other local Schenley distributors and to sell and offer for sale said brand of "Old Quaker" at the price of 77c or less per pint in order to meet said competition although the uniform and standard price for said brand then fixed in said contracts was 98c per pint; that several of said retailers did so violate their contracts and threatened to do so; that the sales by said retailers at said price of 77c and below did not yield said retailers a fair and reasonable profit and some of said retailers began to and did offer to the public substitute brands for said "Old Quaker" when said public called for said "Old Quaker" at the respective stores of said retailers; that said condi-

tion caused plaintiff great loss and threatened irreparable injury until said defendant a day or so later commenced to sell said brand of "Old Quaker" at 98c per pint, said price being then the price stipulated in said Fair Trade Agreements as aforesaid.

19. That on or about November 8, 1935, defendant, Carl L. McNeil, doing business as McNeil's Liquor Store, did [fol. 2-19] again offer to sell, advertise for sale and sell on the premises of said store in said city said brand of "Old Quaker" at 77c per pint; that said price was below the uniform and standard Schenley retail price for same as fixed in said Fair Trade Agreements between plaintiff and the other local Schenley distributors with the retailers of said city as aforesaid; that the defendant on or about said November 8, 1935, placed in the front display window of said store or place of business in said City of Chicago for the observation of the public and consumers, bottles of Schenley Products bearing the trade-name and trade-mark of "Old Quaker" and placed above said bottles attached to the pane of said window signs advertising "Old Quaker" at 77c per pint; that said price was approximately 20% below the uniform and standard Schenley retail price for said brand of "Old Quaker" fixed at said time and prior thereto, in the contracts of sale by plaintiff and local distributors with the majority of retailers selling brands of Schenley Products in said City of Chicago as aforesaid; that at said time and prior thereto said defendant well knew that plaintiff and other local Schenley distributors had sold to numerous retailers in said City of Chicago said brand of "Old Quaker" upon the agreement of said retailers, as above set forth, not to resell said brand of "Old Quaker" sold to them at less than 98c per pint and that said retailers were so selling said brand; that notwithstanding said knowledge of said defendant wilfully and knowingly so advertised and offered for sale said brand at less than the price stipulated in said contracts so entered into pursuant to the provisions of the Fair Trade Act.

[fol. 2-20] 20. That all of the quantity of said brand of "Old Quaker" which defendant threatened to sell, offered to sell, advertised for sale and sold at retail as aforesaid in said city below said uniform and standard Schenley retail price for said brand as fixed in said Fair Trade Agree-

ments as aforesaid, and is so threatening to sell, offering for sale, advertising for sale and selling at retail as aforesaid, was purchased by the defendant from various persons within the State of Illinois who kept and had said quantity in stock in said State prior to selling same to said defendant; that said quantity so purchased by defendant from said persons was purchased subsequent to the time when said Fair Trade Agreements were entered into by plaintiff and the other local Schenley distributors with substantially all of the retailers of said City of Chicago, and subsequent to the time said defendant knew of the standard and uniform Schenley retail price for said brand of "Old Quaker" fixed in said Agreement as aforesaid; that none of the quantity of said brand of "Old Quaker" which the defendant threatened to sell, offered to sell, advertised for sale or sold at retail as aforesaid below said price as aforesaid, or is threatening to sell, offering to sell, advertising for sale and selling below said price as aforesaid was so dealt with or is being so dealt with by defendant for the purpose of or in the course of closing out said quantity of said brand for the purpose of discontinuing delivery of said brand, nor because said quantity nor any part thereof was or is damaged or deteriorated nor on account of or pursuant to an order of court.

21. That unless said defendant is restrained forthwith by this court from advertising for sale, offering for sale, [fol. 2-21] and selling or continuing to advertise for sale, offer for sale and selling said brand of Schenley Products, namely, "Old Quaker," at less than the standard and uniform Schenley retail price fixed as aforesaid, namely, the price of $1.89 per quart, 98c per pint, and 50c per one-half pint of "Old Quaker," plaintiff will suffer great and irreparable injury, to wit: (a) said wilful acts of defendant will induce, coerce and force other retailers who have promised plaintiff as aforesaid, to breach said promises and sell below said standard and uniform Schenley retail price; (b) said wilful acts of the defendant will cause the public and consumers to believe that the various brands of Schenley Products are not worth the prices so fixed as aforesaid and other retailers will not be able to sell the various brands of Schenley Products including "Old Quaker" at such uniform and standard retail prices; (c)

that said wilful acts of the defendant will occasion great loss to the good-will established by plaintiff and local Schenley distributors and will destroy the value of the trade-marks and trade-names of the various brands of Schenley Products; (d) that said wilful acts of defendant will cause the public to confuse the various brands of Schenley Products; (e) that said wilful acts of defendant will demoralize the market for said Schenley Products in said City of Chicago and will cause general uneconomic lowering of prices and prevent persons selling said products from receiving a fair compensation for their services; (f) that said wilful acts of defendant imminently and immediately threaten devastation of plaintiff's business, destruction of plaintiff's good-will and multiple breaches and violation of agreements between plaintiff and other retailers as aforesaid.

[fol. 2-22] 25. That it will be extremely difficult to ascertain the amount of compensation which would afford relief to plaintiff for loss of sales, destruction of plaintiff's business and good will pertaining thereto occurring by virtue of the aforesaid acts of defendant; that pecuniary compensation will not afford plaintiff adequate relief; that restraint is necessary to prevent multiplicity of judicial proceedings.

Wherefore plaintiff prays:

(1) That upon presentation to the Court by plaintiff of such bond as the Court may require and approve, the Court grant a preliminary writ of injunction restraining the defendant, Carl L. McNeil, his employes, representatives, servants, salesmen, clerks, agents and attorneys, pending final hearing or sooner determination of this cause, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail within the City of Chicago, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade-mark and trade-name of "Old Quaker," at a price below $1.89 per quart, 98c per pint, and 50c per one-half pint;

(2) That upon final hearing the Court grant a permanent writ of injunction restraining the defendant, Carl L. McNeil, his employes, representatives, servants, salesmen,

clerks, agents and attorneys, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail, within the City of Chicago, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade-mark and trade-name of "Old Quaker," at a price below $1.89 per quart, 98c per pint, and 50c per one-half pint, until the [fol. 2-23] standard and uniform Schenley retail price for said brand within the City of Chicago, is changed.

(3) That the Court grant such other and further relief as to the Court may seem just and meet.

Joseph Triner Corporation, by Joseph Triner, Its Duly Authorized Agent in this Behalf.

Affidavit of Joseph Triner that he has read the complaint, knows the contents thereof and that the same is true.

EXHIBIT "A" TO COMPLAINT

Exhibit "A", being a facsimile of the label affixed to bottles containing the brand of whiskey known as "Old Quaker." The label consists of the figure of a Quaker standing before a sheaf of grain, a sack of malt and three barrels marked "Old Quaker Whiskey." A landscape scene forms the background. Above the picture is the following legend "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." Below the picture is the following, "One Pint. Straight Bourbon Whiskey. Distilled and Bottled By The Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company.'" To the right of the picture is printed the following: "Old Quaker says: 'You don't have to be rich to enjoy rich whiskey!' Old Quaker Brand is a select straight whiskey distilled according to the finest old traditions . . . truly a mellow, full bodied whiskey of distinction." To the left of the picture is printed the following: "Old Quaker Brand. Straight Bourbon Whiskey. [fol. 2-24] This Whiskey is one year old. Distilled and bottled by the Old Quaker Company, Lawrenceburg, Ind."

Exhibit "B", in words and figures as follows:

EXHIBIT "B" TO COMPLAINT

Fair Trade Agreement

This Agreement made at Chicago, Illinois, this — day of ——, 19—, by and between Joseph Triner Corporation of Chicago, Illinois (hereinafter referred to as "Distributor") and —— —— (hereinafter referred to as "Retailer"), of Chicago, Illinois.

Witnesseth:

Whereas, Joseph Triner Corporation is engaged as a distributor within the city of Chicago, State of Illinois, in the sale at wholesale of certain liquors and alcoholic beverages of domestic manufacture of standard quality, bearing the trade mark, brand and name of the producer and/or owner of said liquors and alcoholic beverages, which are in fair and open compensation with liquors of the same general class produced by others; said liquors and alcoholic beverages being listed and more specifically described in a schedule marked "Schedule A" attached hereto and incorporated herein as part of this agreement (said liquors and alcoholic beverages being hereinafter referred to as "Schenley Products"); and,

Whereas, Retailer is engaged in said city in the sale at retail of Schenley Products to consumers and the general public at the current retail market price for said products and has an established and substantial business in connection therewith; and,

[fol. 2-25] Whereas, Distributor intends to sell to Retailer and Retailer intends to purchase from Distributor, Schenley Products upon the terms and conditions hereinafter set forth; and,

Whereas, Distributor and Retailer are desirous of availing themselves of, and securing to themselves and the public the benefits of, a certain Illinois Statute approved July 8, 1935, entitled, "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name", commonly known as the "Fair Trade Act"; and,

Whereas, in accordance with the provision of said Act and in the interest of protecting Distributor, Retailer and the public against injurious and uneconomic practices in the distribution of Schenley Products, Distributor proposes that any and all Schenley Products sold and purchased hereunder shall not be resold by Retailer except at the resale price, stipulated by Distributor as hereinafter provided, and Retailer proposes not to sell said products purchased hereunder except at said resale price as stipulated by Distributor; and,

Whereas, Distributor has entered, and is entering into, fair trade contracts with numerous other persons selling Schenley Products at said current retail market price which contracts contain provisions for resale price and resale price maintenance identical with those provided herein:

Now Therefore, in consideration of the promises hereinafter set forth Distributor and Retailer mutually agree as follows:

1. Retailer agrees not to resell, offer for resale or advertise for resale, either directly or indirectly, any brand of [fol. 2-26] Schenley Products, purchased hereunder by Retailer from Distributor, except at the resale price set opposite said brand listed in the schedule marked "Schedule A" attached hereto and incorporated herein as part of this agreement; provided, however, the undertaking of Retailer in this paragraph contained aforesaid shall not apply to Products sold by Distributor to Retailer in interstate commerce. Distributor shall notify Retailer of all Products sold by Distributor to Retailer in interstate commerce.

2. Distributor agrees to sell to Retailer and Retailer agrees to purchase from Distributor for the term of this contract any and all of Schenley Products which Retailer shall require for Retailer's business, provided, however, that so long as this contract remains in full force and effect Distributor agrees to sell to Retailer and Retailer agrees to purchase from Distributor during the first month after the date hereof and during each successive monthly period thereafter Schenley Products at a total price to Retailer hereunder of not less than $5.00 nor more than $1000.00.

3. Retailer agrees to pay to Distributor and Distributor agrees to accept from Retailer as the purchase price of all brands of Schenley Products sold by Distributor to Retailer hereunder, the price set opposite said brands listed in the schedule marked "Schedule A" attached hereto and incorporated herein as part of this agreement.

4. This agreement shall continue in full force and effect for a period of one (1) year from the date hereof provided, however, that this agreement may be terminated by either Distributor or Retailer upon the giving of at least ten (10) days written notice to the other. Notwithstanding [fol. 2-27] any termination of this agreement, whether under the provision hereof or otherwise, this agreement shall continue in force with respect to any Schenley Products purchased by Retailer from Distributor hereunder, prior to the occurrence of said termination, and in Retailer's possession or under his control at the time of said termination.

In Witness Whereof, the parties hereto have duly executed this agreement, all as of the day and year first above written.

Joseph Triner Corporation, by ——— ———, Pres. ——— ———, by ——— ———.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. Section 2 of the Illinois Fair Trade Act.

Exhibit "C", as follows:

EXHIBIT "C" TO COMPLAINT

Fair Trade Agreement

All Schenley Products sold and purchased hereunder are sold and purchased upon the express agreement of the buyer and the buyer hereby agrees not to retail same except at the seller's retail price list for same in force at the date

hereof, it being the intention of the parties to avail themselves of the Illinois Fair Trade Act.

[fol. 2-28] Summons and endorsement of Sheriff thereon.

Appearance of Carl W. McNeil, doing business as McNeil's Liquor Store, defendant, by J. Herzl Segal, his attorney.

Order entered November 16, 1935, in words and figures as follows:

ORDER DIRECTING ISSUANCE OF TEMPORARY INJUNCTION

This cause coming on to be heard upon the complaint filed herein and the affidavit filed therewith and in support thereof and in support of the prayer of said bill of complaint that a preliminary injunction issue, pending the determination of the cause on final hearing or sooner determination thereof, and the Court having read said complaint and accompanying affidavit and having heard the arguments of counsel and the defendant having had due notice that this matter was coming on to be heard at this time on the application for a preliminary injunction and said defendant appearing in Court by counsel in opposition to said application:

It Is Therefore Ordered by the Court, upon good cause shown, that an injunction bond to the defendant, Carl W. McNeil be waived and that the Clerk of this Court issue, under the hand and the seal of this Court a preliminary writ of injunction enjoining and restraining Carl W. McNeil, his employees, representatives, servants, salesmen, clerks, agents, and attorneys, pending final hearing or sooner determination of this cause, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail within the City of Chicago, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade mark and trade name of "Old Quaker," at a price below $1.89 per quart, 98c per pint, and 50c per one-half pint.

[fol. 2-29] And, It Is Further Ordered that said injunction remain in full force and effect until this Court shall make order to the contrary.

Enter.

Benjamin P. Epstein, Judge.

Written motion of defendant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law, filed November 18, 1935, in words and figures as follows:

MOTION TO DISMISS, ETC.

The defendant, Carl W. McNeil, moves that the temporary injunction heretofore issued in the above entitled cause be dissolved and that a decree be entered herein dismissing the complaint of Joseph Triner Corporation, plaintiff, for want of equity on the ground that complaint is substantially insufficient in law, and defendant specifies the following respects in which said complaint is insufficient:

I.

The alleged cause of action set forth in said complaint is predicated upon an unconstitutional and void statute passed by the General Assembly of the State of Illinois, to-wit: "An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." (Approved July 8, 1935, L. 1935, P. 1436), hereinafter referred to for convenience as the "Fair Trade Act."

A. Article I, Section 8 of the Constitution of the United States provides: "The Congress shall have power—* * * [fol. 2-30] to regulate commerce * * * among the several states * * *;" Said Fair Trade Act violates said Article I, Section 8, in that it attempts to regulate the sale of commodities in commerce among the several states.

B. Article I, Section 10 of the Constitution of the United States provides: "No state shall * * * pass any * * * law impairing the obligation of contracts; * * *." Said Fair Trade Act violates said Article I, Section 10, in that it impairs the obligation of the contracts of purchase and sale whereunder the plaintiff acquired the commodities alleged to have been offered for sale and sold by him, and impairs the obligations of like contracts of persons similarly situated.

C. Article XIV of Articles in addition to, and Amendment of, the Constitution of the United States, provides: "* * * nor shall any state deprive any person of * * * property, without due process of law." Said Fair Trade Act violates said Article XIV in that:

1. Its provisions, terms and language are so incomplete, vague, indefinite and uncertain that said act does not express clearly or intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder;

2. It deprives the defendant and persons similarly situated of vested rights in articles and commodities owned by him;

3. It provides for an arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being producers and owners of commodities bearing a trade mark, brand or name of the producer or owner, and the other class being producers and owners of commodities not bearing [fol. 2-31] such trade mark, brand or name.

4. It provides for an arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being retailers of commodities bearing the trade mark, brand or name of the producer or previous owner and the other class being retailers of commodities not bearing such trade mark, brand or name.

D. Article XIV of Articles in addition to, and Amendment of, The Constitution of the United States, provides: "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." Said Fair Trade Act violates said Article in that:

1. It denies to defendant, and persons similarly situated, such right to dispose of his commodities as is enjoyed by persons dealing in commodities not bearing the trade mark, brand or name of the producer or owner;

2. It denies to producers and owners of commodities not bearing such trade mark, brand or name the right to fix the resale price thereof as is sought to be conferred upon producers and owners of commodities bearing such trade mark, brand or name.

E. Article II, Section 2, of the Constitution of Illinois of 1870, provides: "No person shall be deprived of * * * property, without due process of law." Said Fair Trade Act violates said Article II, Section 2, for the reasons set forth hereinabove in Point C, Paragraphs (1), (2), (3) and (4).

[fol. 2-32] F. Article II, Section 14, of the Constitution of Illinois of 1870, provides: "No * * * law impairing the obligation of contracts * * * shall be passed." Said Fair Trade Act violates said Article II, Section 14, for the reasons set forth hereinabove in Point B.

G. Article IV, Section 1, of the Constitution of Illinois of 1870, provides: "The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people." Said Fair Trade Act violates said Article IV, section 1, in that:

1. It delegates to persons, not constituting the general assembly, the legislative power to determine what constitutes "injurious and uneconomic practices," "articles of standard quality," and "commodities of the same general class";

2. It delegates to such persons the legislative power to determine the price at which commodities should be sold.

3. It delegates to such persons other powers legislative in character.

H. Article IV, Section 22, of the Constitution of the State of Illinois, provides: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for * * * granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special [fol. 2-33] law shall be enacted." Said Fair Trade Act violates said Article IV, Section 22 in that:

1. It grants to vendors and purchasers of commodities bearing a trade mark, brand or name of the producer or owner the special and exclusive privilege of fixing the resale price thereof;

2. It grants to vendors and purchasers of commodities bearing such trade mark, brand or name, the special and exclusive privilege of controlling the price at which defendant and persons similarly situated may dispose of his commodities contrary to his volition.

3. It grants to vendors and purchasers of commodities bearing such trade mark, brand or name, the special and exclusive privilege of restricting the right of defendant and persons similarly situated to contract with reference to commodities owned by him.

4. It grants to retailers of commodities not bearing such trade mark, brand or name, the special and exclusive privilege (which is denied to defendant and persons similarly situated) of selling the commodities owned by them at a price or prices not controlled by persons with whom they have no privity of contract.

5. It grants to vendors and purchasers of commodities bearing such trade mark, brand or name, a special or exclusive immunity from the penalties and punishments imposed by a certain law passed by the General Assembly of the State of Illinois, to-wit: "An Act to provide for the punishment of persons, copartnerships, or corporations [fol. 2-34] forming pools, trusts and combines, and mode of procedure, and rules of evidence in such cases." (Approved June 11, 1891. L. 1891, p. 206.)

I. Said Fair Trade Act violates diverse other Articles and sections thereof of the Constitution of the United States and of the State of Illinois.

J. Herzl Segal, Attorney for Defendant, Carl W. McNeil, Doing Business as McNeil's Liquor Store.

Certificate

I, J. Herzl Segal, attorney for the defendant in the above entitled cause, do hereby certify that the above and foregoing motion for decree dismissing the complaint for want of equity is not interposed for the purpose of delay and in my opinion it is well founded in point of law.

J. Herzl Segal.

Decree entered December 24, 1935, in words and figures as follows:

DECREE

This cause coming on to be heard on motion of the defendant, Carl W. McNeil, for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law, and the Court having heard the arguments of counsel for the defendant, and of counsel for the plaintiff, and being fully advised in the premises, it is hereby ordered that said motion of said defendant be and the same is hereby overruled. Whereupon the said defendant elects to abide by its said motion without further pleading on his part to the complaint in the above cause,

[fol. 2-35] It Is Therefore Ordered, Adjudged And Decreed that the said defendant, Carl W. McNeil, his employees, representatives, servants, clerks and attorneys, be and they and each of them are hereby permanently restrained and enjoined from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail, within the City of Chicago, State of Illinois, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade mark and trade name of Old Quaker at a price below $1.89 per quart, 98c per pint and 50c per one-half pint, until the standard and uniform Schenley retail price for said brand within the city of Chicago, state of Illinois is changed; and it is hereby ordered that a permanent writ of injunction be issued out of this Court by the Clerk hereof restraining and enjoining the said defendant, Carl W. McNeil, his employees, representatives, servants, clerks and attorneys, and each of them, from directly or indirectly advertising for sale at retail, offering for sale at retail, or selling at retail, within the City of Chicago, state of Illinois, a certain brand of whiskey distributed by Schenley Distributors, Inc., a New York corporation, said brand bearing the trade mark and trade name of Old Quaker at a price below $1.89 per quart, 98c per pint and 50c per one-half pint, until the standard and uniform Schenley retail price for said brand within the city of Chicago is changed.

It Is Further Ordered, Adjudged And Decreed that the plaintiff have and recover of and from said defendant, Carl W. McNeil, its costs taxed in the above suit.

Enter. Benjamin P. Epstein, Judge.

[fol. 2-36] Notice of appeal, filed December 27, 1935.

Notice of filing of notice of appeal and proof of service thereof, filed December 28, 1935.

Præcipe for record and proof of service thereof, filed January 4, 1936.

REPORT OF PROCEEDINGS AT TRIAL—Filed January 9, 1936

OPINION

Statement of the Honorable Benjamin P. Epstein of the reasons for his decision, as follows:

The plaintiff, Joseph Triner Corporation, by its bill of complaint, alleges that it is a corporation engaged in business in the City of Chicago, County of Cook and State of Illinois, as a wholesale distributor, selling to retailers for resale in said city, various brands of liquors and alcoholic beverages of standard quality.

That the defendant, McNeil, is engaged in the business of selling at retail to the general public for consumption, various brands of liquor and alcoholic beverages; that the liquor sold by the plaintiff corporation is purchased from a corporation known as Schenley Distributors, Inc., a corporation organized and existing under and by virtue of the laws of the State of New York and duly licensed to do business in the State of Illinois; that Schenley Distributors, Inc., is the sole and common sales agent in the State of Illinois of several affiliated liquor distilleries and as said sales agent is engaged in the City of Chicago in the distribution of the products manufactured by said distilleries referred to and known as "Schenley Products"; that Schenley Distributors, Inc., sells and has sold Schenley Products to various wholesalers within said city for purposes of resale to retailers in said city; that the said wholesalers are known as [fol. 2-37] "local Schenley distributors" and are at the present and have been about ten in number; that the Schenley Products consist of various brands of straight whiskies, blended whiskies, bonded whiskies, gin, brandies and rum; that all of said brands at all times have been of standard quality or make; that all the said brands are sold in bottles

of standard size and content, each and all of which bottles has and have affixed therein a label bearing the trade mark "Registered with the United States Patent Office" and the brand and name of the producer; that said brands have been known in the liquor trade and to the general public by the trade name of "Old Quaker" and "Cream of Kentucky"; that each and all of said brands of Schenley Products sold at retail in the City of Chicago at all times have been in fair and open competition with commodities of the same general class produced by persons other than Schenley distilleries; that the Schenley Distributors, Inc., at all times has adhered to a trade policy of securing to the general public in the City of Chicago a uniform and standard retail price for each brand of Schenley product sold in said city; that said uniform standard retail prices at all times were fair and reasonable; that in accordance with its said business and trade policy of securing to the public or consumers a uniform and standard retail price for each of its brands, Schenley Distributors, Inc., has openly announced that it would not sell its products to any local Schenley Distributors who sold products to any retailer for less than the uniform and standard retail price suggested by Schenley Distributors, Inc.

The bill further alleges that there has been in force in the State of Illinois an Act duly passed by the General As- [fol. 2-38] sembly on July 8, 1935, known as the Fair Trade Act entitled "An Act to Protect Trade Mark Owners, Distributors, and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Trade Mark, Brand or Name," which Act in effect provides that no contract relating to the sale or resale of a commodity which bears, or the label or the content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of a provision, first, that the buyer will not resell such commodity except at the price stipulated by the vendor, and second, that the producer or vendee of a commodity require upon the sale of such commodity to another that such producer agree that he will not in turn resell except at the price stipulated by such producer or vendee; section 2 of the Act further

providing that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, be considered unfair competition and actionable at the suit of any person damaged thereby.

The bill further alleges that after the enactment of said Act the complainant, to protect itself and the public and to avail itself of the benefits of said Act, in all of its sales of Schenley Products to retailers in said city, by agreement with said retailers, fixed the resale price of its brands at [fol. 2-39] the uniform and standard Schenley retail price; that all of this was known to the defendant; that all Schenley distributors in the City of Chicago made substantially all of their sales of Schenley products to retail sellers upon the same conditions as to the fixing of a resale price; that the defendant advertised and sold Schenley Products bearing the trade name and trade mark of the producer of said brands at a price below the uniform and standard Schenley retail price for said brands, and that the defendant knowingly and wilfully advertised and offered for sale and sold said brands at less than the standard and fixed price. The bill prays for a permanent injunction restraining the defendant from acts of price cutting.

On November 16, 1935, on the application of the complainant, a temporary injunction was issued by this court, restraining the defendant, Carl W. McNeil, doing business as McNeil's Liquor Store, from directly or indirectly advertising for sale at retail or selling at retail within the City of Chicago the brands of whiskey distributed by Schenley Distributors, Inc. under the trade mark and trade name of "Old Quaker" at a price below $1.89 per quart, 98c per pint and 50c per half-pint.

The defendant has moved to dismiss the complaint and to dissolve the injunction on the ground that the Act of the General Assembly of the State of Illinois known as the Fair Trade Act was unconstitutional and void.

Upon the argument of the said motion to dismiss the bill of complaint, which motion in effect admitted the truth of the allegations of the bill of complaint well pleaded, it was contended that the Fair Trade Act was in violation of the 5th and 14th amendments to the Constitution of the United

[fol. 2-40] States in that it deprived persons of their property without due process of law and without compensation; that it abridged privileges and immunities of citizens; that it deprived them of the full and free use of their individual property; that it imposed an unlawful, unnecessary and unreasonable restraint upon the alienation of property; that it was not a valid exercise of the police power of the State; that it was not for the protection of the peace, health, safety, morals or welfare of the public and that it was for the benefit of an arbitrary and unjust classification of persons named in the Act; that its provisions were vague, uncertain and indefinite, and that it impaired the obligation of contracts.

In discussing the question of the constitutionality of the Act in question, it may be well to state at the outset that seven or eight of the States of the Union have passed a similar statute within the past two years. My attention has been called to a similar statute in the State of California, Wisconsin, New York and others. The validity of this particular kind of legislation has as yet not been passed upon by the courts of last resort of the particular States which have legislated upon the subject. A number of lower courts in the various States have, however, passed upon the constitutionality of statutes similar to the one in question. A few have held this character of legislation to be in violation of the Constitution of the United States and an unwarranted and unconstitutional exercise of the police power of the State.

The greater number of the decisions, however, have sustained the legislation and have declared it to be legislation passed under the valid exercise of the police power of the State.

[fol. 2-41] The diversity in opinion of the various chancellors who have passed upon the question throughout the United States justifies the statement recently made by Prof. Thomas Read Powell in his article of November, 1935, entitled "Commerce, Pensions and Codes" in the Harvard Law Review:

"The problem of the extent to which government should regulate will always pose innumerable questions upon which men will differ in their views. After government has regulated, those who dislike the statute may still differ about it. Some will call it unconstitutional and some will

be content to stop with saying that it is unpleasant and unwise."

In a long line of cases decided by the Supreme Court of the United States, we find authority for the statement that the Constitution of the United States does not guarantee the unrestricted privilege to engage in business or to conduct it as one pleases, and that the 5th Amendment to the Constitution of the United States in the field of Federal activity and the 14th Amendment as respects State action do not prohibit government regulation for the public welfare. The case of Tyson v. Banton (273 U. S. 418) holding a law of the State of New York, prohibiting "ticket scalping," invalid, is not in conflict with this doctrine. For while the Court in that case did say:

"The right of the owner of property to fix a price at which his property shall be sold or used is an inherent attribute of the property itself and as such within the protection of the due process of law clauses of the 5th and 14th Amendments to the Constitution of the United States (City of Carrollton v. Bizett, 159 Ill. 284, at p. 294)."

It, nevertheless, also said:

[fol. 2-42] "The power to regulate property, service or business may be invoked, but only under special circumstances."

In one of the recent decisions (Nebbia v. New York, 291 U. S. 529) of the Supreme Court of the United States on the effect to be given to the 5th and 14th Amendments to the Constitution, we find the following principles of law announced:

"They (5th and 14th Amendments) merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as had often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and a substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort or for the same business under other circumstances, because the reasonableness of each regula-

tion depends upon the relevant facts. The reports of the Supreme Court of the United States abound with cases in which the citizen, individual or corporate, has vainly invoked the 14th Amendment in resistance to necessary and appropriate exertion of the police power of the State. Legislation concerning sales of goods and incidentally affecting prices, has been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another (Central Lumber Co. v. South Dakota, 226 U. S. 157) by giving trade inducements to purchasers, (Rast v. Van Deman & Lewis Co., 240 U. S. 342) and by other forms of price discrimination. (Van Camp and Sons Co. v. American Can Co., 278 U. S. 245)."

[fol. 2-43] The statute involved in the case of Nebbia v. New York, supra, was a Statute of the State of New York in effect fixing the selling price of milk to retailers and to the consuming public. This Statute was held to be valid. Likewise consistent with the principles announced by the Supreme Court in the above cases are the principles of law laid down by the Supreme Court of the State of Illinois in the case of Stewart v. Brady, 300 Ill. 425, in which case the Blue Sky Law of the State of Illinois was held to be a valid exercise of the police power of the State. In that case the Supreme Court of our State said:

"It is a question for legislative determination whether an evil exists and what means should be adopted to prevent it, and its acts will not be interfered with unless they are clearly in violation of some constitutional limitation. * * * Its classification of the objects of legislation is not required to be scientific, logical or consistent if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary. * * * It cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. It is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblance, though such power cannot be arbitrarily exercised, and the distinction must have a reasonable basis (International Harvester Co. v. Missouri, 234 U. S. 199).

In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words: 'It is to be remembered that the question presented is of the power of the legislature—not the policy of the exercise of the power. To be able to find fault, therefore, [fol. 2-44] with such policy is not to establish the invalidity of the law based upon it.'

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature and the earnest conflict of serious opinion does not suffice to bring them within the reign of judicial cognizance * * * One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In the case of German Reliance Insurance Company v. Kansas, 233 U. S. 389, the Supreme Court of the United States said:

"Against that conservatism of the mind which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it becomes familiar, government, state and national—has pressed on in the interest of the general welfare; and our reports are full of cases where in instance after instance the exercise of the regulation was resisted, and yet sustained against attacks asserted to be justified by the Constitution of the United States. The fear and the dread of the moment having passed, no one is now heard to say that rights were restrained or constitutional guarantees impaired."

Again, in sustaining the constitutionality of a zoning ordinance, attacked as a violation of the 14th amendment, the Supreme Court said:

"Regulations, the wisdom, the necessity and validity of which, as applied to existing conditions, are so apparent [fol. 2-45] that they are now uniformly sustained, a century ago, probably would have been rejected as arbitrary

and oppressive." (Village of Euclid v. Ambler Realty Co., 272 U. S. 365.)

What did the legislature of the State of Illinois have in mind when they passed the Fair Trade Act, giving a remedy to that great and large class of persons and corporations who engage in trade and industry selling commodities under a trade mark, trade name and brand, and imposing restrictions in certain events upon the alienation of property in the hands of an individual? Was it as was said in the case of Steward v. Brady, supra, a question for legislative determination as to whether an evil existed and what means should be adopted to prevent it? Did an evid exist? And was the creation of a right and the imposition of a burden a valid exercise of the police power of the state and for the general welfare of the people of the State of Illinois? The legislature undoubtedly had in mind the evil of price cutting and the demoralization and the destruction of legitimate business as a result thereof. Perhaps it believed in the economic truth of the views of Mr. Gilbert H. Montague set forth in his book, Business Competition and the Law, published by Putnam and Sons, New York:

"Every purchaser knows that no matter from whom he buys popular branded goods, he will receive the same quality for the standard price. Competition, therefore, becomes transformed and vastly increased, and expands into national dimensions. Every popular brand of goods competes with all unbranded goods of the same general class and with all other brands of goods of the same general class. Prices on any popular brand of goods are prevented [fol. 2-46] by this competition from being too high. For any excess in price of one brand over that of unbranded goods or other brands of goods of the same general class cannot exceed the sum that the consumer will be willing to pay for the insurance of quality and reliability. * * * Since the manufacturer of popular branded goods assumes the chief part of the salesmanship in each successive sale and resale of goods, and the consuming public does not have its standard price increased—for competition as we have seen prevents this—it would seem to be in the public interest to permit the manufacturer to use this reasonable means to expand his business for the sake of more effective competition with his rivals * * * Price cutting more

often is only a sudden raid, timed by the price cutter so as to produce the greatest demoralization and stampede of his competitor's trade, not only in the lines on which he is cutting prices, but also in other lines, and executed at a large initial loss to the price cutter in the confidence that under cover of the resulting demoralization and stampede he can more than recoup upon other lines. So immediate and deadly is this kind of price cutting that if a price cutter misses killing his dealer competitor, he not infrequently kills, and always seriously hurts the manufacturer of the popular branded goods."

Perhaps the legislature had in mind the words and subscribed to the views of Justice Oliver Wendell Holmes of the United States Supreme Court, expressed in his dissenting opinion in the case of Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 412:

"I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

[fol. 2-47] Perhaps the legislature believed in the economic truth of the views expressed by the Supreme Court of the United States in the Appalachian Coal Co., Inc. v. U. S., 288 U. S. 344, p. 374:

"The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices."

It is to be noted that the statute, the "Fair Trade Act," applies only to the sale or resale of a commodity which is in effect in open competition with commodities of the same

tive label upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt and three barrels marked "Old Quaker Whiskey." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whiskey. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company.". The whiskey has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is retailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half pint. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising "Old Quaker", as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for "Old Quaker" and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such distributor. The distributors, in turn, refuse to sell "Old Quaker", or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end, the plaintiff and the other local distributors make all sales of "Old Quaker" or other Schenley products under agreements of sale denominated "Fair Trade Agreements", which expressly provide that the retailer will not resell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the Schenley retail price list for "Old Quaker" and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a liquor retail dealer, from selling Old Quaker whiskey in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributors, Inc., sought to maintain the prices specified in the fair trade agreements."

The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price, and at a loss or scant return to themselves for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands, but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at wholesale "Old Quaker" and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for resale in the city the various brands of Schenley products, including "Old Quaker". Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint, a uniform price assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell, offer for sale and advertise for sale at retail, a quantity of "Old Quaker" at a price appreciably below the uniform Schenley retail price for the brand stipulated in the contracts. On October 16, the plaintiff informed the defendant of its trade policy in maintaining a uniform price for "Old Quaker" and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of "Old Quaker". The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell to him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions, the defendant offered for sale and sold large quantities of "Old Quaker" at 77 cents per pint, or more than twenty per cent below the Schenley uniform retail price. Defendant was again urged to desist but refused. On November 8, 1935, he advertised "Old Quaker" for sale at 77 cents per pint.

None of the quantity advertised or sold by the defendant at the cut-price was offered for sale or sold in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section 1 of the Fair Trade act. During this time "Old Quaker" was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

The plaintiff charged that as a consequence of the defendant's conduct, a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the

defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a fair and reasonable profit, and that when the public requested "Old Quaker" some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are that if the defendant continues his practice, the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed Fair Trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that "Old Quaker" is not worth the uniform retail price and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trade-marks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products, and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices. The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and over-ruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail "Old Quaker" whiskey at a price below $1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and

State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety, but also for the promotion of the general welfare. *Fenske Bros* v. *Upholsterers Union*, 358 Ill. 239; *City of Aurora* v. *Burns*, 319 id. 84. The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (*Public Utilities Co.* v. *City of Quincy*, 290 Ill. 360. The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in *Noble State Bank* v. *Haskell*, 219 U. S. 104; 'It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v. *United States*, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' "

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as

the Anti-Trust act of this State enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stats. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article, sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests," observed the California Supreme Court in *Max Factor & Co. v. Kunsman,* 55 Pac. (2d) 177, "is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix resale prices.

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this Court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we can not help but note that many of the present legislative enactments such as the Fair Trade acts of New York, California and Illinois are resultants brought about because of the failure of the public and, particularly, the business public to observe those

ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship, nor in keeping with the best traditions of the law merchant as known at the common law. If public opinion can not check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence, and preventing its use as a "loss leader" by those who would sell it for the purpose only of inveigling the public into patronizing their places of business in the hope of obtaining a profit on other goods of inferior quality In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed have any real substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. *People* v. *Belcastro,* 356 Ill. 144; *People* v. *Rosehill Cemetery Co.,* 334 id. 556; *Condon* v. *Village of Forest Park,* 278 id. 218; *People* v. *Steele,* 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered and is, of course, subject to the legitimate exercise of the police power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago. *Robt. H. Ingersoll & Bro.* v. *Hahne & Co.,* 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in 1916 declared it unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good will of any maker in

whose product they dealt, or to discriminate against it by depreciating the value of the products in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United States to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of the firm for fair dealing and reliable products was nation wide; that it was absolutely necessary as a part of the advertising and building up of the business that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer, who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor, in his opinion, said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes."

The injunction granted the complainant was subsequently made permanent in *Robt. H. Ingersoll & Bro.* v. *Hahne & Co.*, 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that even in the absence

of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. • • • In those cases in which the right to fix a resale price has been under consideration, the prohibition against the resale has been against the resale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a resale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a resale of the article, nor is it impracticable to resell the article without reference to the trade-name. • • • Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit. • • • It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the resale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of *Nebbia* v. *New York*, 291 U. S. 502, that because the Milk-Control law of New York essayed to control prices it denied due process. The Supreme Court of the United States in answering this contention, said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself.

This view was negatived many years ago. *Munn* v. *Illinois*, 94 U. S. 113."

The court reviewed numerous decisions (*German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *Griffith* v. *Connecticut*, 218 id. 563; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 id. 251; *Frisbie* v. *United States*, 157 id. 160; *Yeiser* v. *Dysart*, 267 id. 540; *Cotting* v. *Kansas City Stockyards Co.*, 183 id. 792 and *Stephenson* v. *Binford*, 287 id. 251;) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 535. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes *Doubleday, Doran & Co.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade Act identical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth

in the complaint. The articles in question were books. The Doubleday books are not commodities within the accepted meaning of the term. Each book rests upon its own merit and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade Act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. The court, in *Max Factor & Co.* v. *Kunsman*, *supra*, distinguished the *Doubleday, Doran & Co.* decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co., Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a *contract between themselves.*'

"Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, atempting to exact, from the buyer and restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege

only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual set-up in the *Max Factor & Co.* case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons, and grants to such persons special privileges and immunities in contravention of the constitutional guaranties invoked. He asserts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may under certain circumstances fix the resale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assumption that there is no rational basis for denying to the vendors and vendees of commodities not bearing such trade-mark symbols the right to fix the resale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. *Nebbia* v. *New York* supra; *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 id. 61; *Magoun* v. *Illinois Trust and Savings Bank*, 170 id. 283; *Mich. Millers Ins. Co.*, v. *McDonough*, 358 Ill. 575; *Stewart* v. *Brady*, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. *Mich. Millers Ins. Co.* v. *McDonough, supra; Jones* v. *Chicago, Rock Island and Pacific Railway Co.*, 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½ of which corresponds to the Fair Trade act of our State, *Max Factor & Co.* v. *Kunsman, supra*, said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to nontrade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in ref-

erence to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The anti-Trust act expresses the public policy of the State against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly. *Harding* v. *American Glucose Co.*, 182 Ill. 551. The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be resold, irrespective of whether resold under the trade-mark. It permits restrictions to be placed on the *use* of trade-marks, names and brands, not restrictions on the price of commodities generally, except as the plaintiff contends, to the extent that new commodities may become involved in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store and thereby induces the visitors to become purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name, "Old Quaker", by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only resale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. Section 1 specifically provides that a commodity in order to be subject to the contracts permitted under the Fair Trade act must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers or between wholesalers or between retails as to sale or resale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. *Robert H. Ingersoll & Bro.* v. *Hahne & Co. supra; Fisher Flouring Mills Co.* v. *Swanson,* 76 Wash. 649, 137 Pac. 144. Application of section 2 of the statute to the facts discloses that "Old Quaker" whiskey is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whiskey at a lower price than the standard price for "Old Quaker." The statute merely prevents him from filching the good will associated with the descriptive mark and name of "Old Quaker" for his own ulterior purposes.

Horwich v. *Walker-Gordon Laboratory Co.* 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated Section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession, by any junk dealer of receptacles bearing registered trade marks *prima facie* evidence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6

which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles described in the first section which had passed from the possession of their owners to others, and which the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act, has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal such as the summary recovery of certain types of personal property. The *Horwich case*, it is true, dealt with trade-marks but solely in their character as indicia of ownership. In the present case, the statute attacked deals not only with trade-marks in that respect but also with the good will built up by a producer or distributor around a trade-mark, trade name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination, should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment respecting the equal protection of the laws. The defendant argues that no distinction can be drawn between the classification

condemned in the *Connolly case* and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification in flagrant violation of the constitutional guarantee of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly prohibited from removing the trade symbol and selling the whiskey, which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstances.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. *Champlin Refining Co.* v. *Commission,* 286 U. S. 210; *Parks* v. *Libby-Owens-Ford Glass Co.* 360 Ill. 130. On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. *People* v. *Huls,* 355 Ill. 412. Furthermore, the legislature is not required to define words in common and daily use. *People* v. *Lloyd,* 304 Ill. 23. A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Omaechevarria* v. *Idaho,* 246 id. 343; *People* v. *Mueller,* 352 Ill. 124; *Amberson* v. *Amberson,* 349 id. 249; *Kowalczyk* v. *Swift & Co.* 329 id. 308. In the light of these

authorities the following words and expressions segrated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "articles of standard quality" employed only in the title, the phrase "in fair and open competition" in section 1, the words "any commodity" and the expression "any contract entered into pursuant to the provisions of section 1" in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section 1 of article 4 of the constitution of this State which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention and the argument supporting it rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act, the Supreme Court of that State, observed that the statute did not merely prohibit price-cutting for the purpose of regulating prices but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. *Max Factor & Co.* v. *Kunsman,* supra. The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that resale price maintenance laws such as the Fair Trade acts of California, New York and Illinois constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operatoin. This does not mean that the act took

effect upon the approval of any authority other than the legislative branch of our State government. *Commonwealth* v. *Goldburg,* 167 Ky. 96, 180 S. W. 68. When the Fair Trade act was passed by the General Assembly it was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree Affirmed.